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No. 91-884

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

FARM CREDIT SERVICES, PETITIONER,

v.

RAYMOND L. MORTER, RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

APPENDIX TO RESPONDENT'S BRIEF IN OPPOSITION

Carolyn S. Holder
HOLDER & DAVIS
700 Bank One Building
P.O. Box 757
Lafayette, Indiana 47902-0757
(317) 742-1124
Counsel of Record for Respondent

Elizabeth A. Justice
WERNLE, RISTINE & AYERS
414 Ben Hur Building
Crawfordsville, Indiana 47933
(317) 362-2640
Counsel for Respondent

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APPENDIX A

IN THE UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF ARKANSAS
FAYETTEVILLE DIVISION

IN RE: JACK and EVA REYNOLDS, No. 87-15311 F
Ch. 7

Debtors

ORDER

Based on the Memorandum Opinion of even date, the Court finds that the monies in the College Retirement Equities Fund Certificate issued in the name of Jack D. Reynolds is not property of the estate. Therefore, pursuant to 11 U.S.C. § 541(c)(2), the Court finds that the trustee has no interest in the above-mentioned certificate.

IT IS SO ORDERED.

/s/ Robert F. Fussell
ROBERT F. FUSSELL
UNITED STATES BANK-
RUPTCY JUDGE

DATE: /s/ 9-18-1989

cc: Mary Winzerling, Esq.
P.O. Drawer 3456
Fayetteville, AR 72702

Marion Wagner, Esq.
121-A South Second Street
Rogers, AR 72756

IN THE UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF ARKANSAS
FAYETTEVILLE DIVISION

IN RE: JACK and EVA REYNOLDS, No. 87-15311 F
Ch. 7

Debtors

MEMORANDUM OPINION

Pending before the Court is a Motion to Deny the Debtors' Exemption of Annuity Plans filed by the trustee. A hearing was held on June 20, 1989 at which time the parties agreed to a stipulation of facts and introduced exhibits. Initially, the debtors listed their interest in the annuity plans as exempt; however, at the hearing the Court allowed the debtors to change their position and argue that the annuities were not property of the estate.

JURISDICTION

This Court has jurisdiction to enter a final order in this core proceeding pursuant to 28 U.S.C. § 157(b)(2)(B). The following constitute the Court's findings of fact and conclusions of law.

FINDINGS OF FACT

The Court received into evidence two documents: a Teacher's Insurance and Annuity Association retirement annuity contract (TIAA) and a College Retirement Equity's Fund retirement unit - annuity certificate (CREF). As of the date of the filing of the debtors' bankruptcy petition the CREF annuity totalled $3,275.44.

Page 3 of the CREF certificate provides the following information. The certificate was issued to Jack D. Reynolds on February 1, 1985 and the annuity starting date is listed as March

1, 1999. Pertinent language on this page states: "This certificate is made and delivered in and is to be performed in the State of New York. The validity and effect of this certificate are governed by the laws there in force."

The CREF certificate contains the following provisions that are also pertinent to the issue before the Court.

(a) Paragraph 29 - "Ownership. You own this certificate. During your lifetime, you may, to the extent permitted by law, exercise every right given by it without the consent of any other person."

(b) Paragraph 30 - "No Assigment. Neither you nor any other person may assign, pledge, or transfer ownership of this certificate or any benefits under its terms. Any such action will be void and of no effect."

(c) Paragraph 31 - "No Cash Surrender or Loans. This certificate does not provide for cash surrender or loans."

(d) Paragraph 36 - "Protection Against Claims of Creditors. The benefits and rights accruing to you or any other person under this certificate are exempt from the claims of creditors or legal process to the fullest extent permitted by law. This protection is contained in the statute of the State of New York establishing CREF."

A general reading of the CREF certificate indicates that it is an annuity contract, wherein premiums are paid to purchase units of the fund. *Cert.* page 5. The certificate does not lapse if premium payment ceases, and premium payments may be resumed at any time. *Cert.* page 5-6. The annuity starting date is set as the first month after the annuitant's sixty-fifth birthday, but may be changed. *Cert.* page 6. In the event of the annuitant's death prior to the annuity starting date, a death benefit is available to a designated beneficiary. *Cert.* page 7. Monies accumulated in the CREF certificate may be transferred to a TIAA contract prior to the annuity starting date. *Cert.* page 9.

CONCLUSIONS OF LAW

Section 541(a)(1) provides, with limited exceptions, that the debtor's estate is compromised of "all legal and equitable interest of the debtor in property at the commencement of the case." This section is very expansive in its reach and clearly emphasizes the Congressional intent that all kinds of property be included in the estate, even that needed for a fresh start. *See* S. Rep. No. 989, 95th Cong., 2d Sess. 823, *reprinted in* 1978 U.S. Code Cong. & Admin. News 5787, 5868. The only exception to this broad concept of property of the estate is 11 U.S.C. § 541(c)(2) which states:

> A restriction on the transfer of a beneficial interest of the debtor in a trust that is enforceable under applicable nonbankruptcy law is enforceable in a case under this title.

11 U.S.C. § 541(c)(2).

It is the position of the debtors that the money in the CREF account, pursuant to § 541(c)(2) is not property of the estate, as it is a trust enforceable under non-bankruptcy law, that is, a spendthrift trust. Conversely, the trustee asserts that the CREF account is an ERISA[1] pension plan that is included as property of the estate.

Recently, the Court of Appeals for the Eighth Circuit handed down a decision concerning the application of § 541(c)(2) to a debtor's interest in a teacher retirement plan. *In re Swanson*, 873 F.2d 1121 (8th Cir. 1989). This case analyzed the retirement plan in light of the Eight Circuit's holding *In re Graham*, 726 F.2d 1268 (8th Cir. 1984). The *Swanson* case involved a teacher retirement plan created by Minnesota statute, and thus was governed by Minnesota law. Membership in the plan was

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1. Employee Retirement Income Security Act of 1974; for ERISA qualifications, see 29 U.S.C. § 1056 and 26 U.S.C. § 401.

mandatory of all public school teachers. Funds in the plan were accumulated by mandatory employee and employer contributions. The Minnesota statute that created the retirement plan also contained many restrictions on the right of a teacher to assign or transfer that teacher's interest in the plan. The Minnesota statute provided that "all monies to the credit of a teacher's account in the fund . . . shall belong to the State of Minnesota until actually paid to the teacher or his beneficiary pursuant to the provisions of this chapter." *Swanson* at 1122-3 (citing Minn. Stat. § 354.10 (1982)).

The *Swanson* court held that the plan was not a valid spendthrift trust under Minnesota law in spite of the many restrictions on alienation. This holding was based on two grounds. First, since a teacher who was also a beneficiary made contributions to the plan, it was considered self-settled. A self-settled trust violated Minnesota's common law which holds that where the settlor of a trust and beneficiary of a trust are the same person, then the trust is not a spendthrift trust. Second, the *Swanson* court noted that the teacher participants were able to exercise dominion and control over the monies in the fund in that they were entitled to certain refunds upon termination of employment. *Swanson* at 1124.

Prior to *Swanson*, *In re Graham*, 726 F.2d 1268 (8th Cir. 1984), might have been read to hold that ERISA type retirement plans were never to be included under 11 U.S.C. § 541(c)(2) since Congress provided for them in the exceptions list of 11 U.S.C. § 522(d)(10).[2] However, the *Swanson* court made it clear that the Eighth Circuit would consider an ERISA plan if it met all the characteristics of a traditional spendthrift trust, as

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2. "There is no indication whatever that Congress intended § 541(c)(2) to be a broad exclusion which would apply to all debtors' entire ERISA plan benefits out of the estate. To the contrary, pension benefits are specifically treated under the Code's *exemption* provision, clearly indicating that they were intended and assumed to be part of the estate." *In re Graham* at 1272.

it stated: "Nevertheless, we do not intend to state a broad rule that monies in any statutory trust are not excluded from the bankruptcy estate under § 541(c)(2)." *Swanson* at 1124.

A bankruptcy court within the eighth circuit has recently decided the very same issue as is before this Court, *In re Daniel Patrick Montgomery*, No. L88-00313C slip op. (Bankr. N.D. Iowa, June 8, 1989). The Honorable Michael J. Melloy, Chief Bankruptcy Judge, Iowa, considered a CREF annuity in light of the Eighth Circuit decisions and New York law concerning spendthrift trusts. Judge Melloy held that the CREF annuity was a traditional spendthrift trust under the laws of New York and that pursuant to 11 U.S.C. § 541(c)(2) the certificate was not property of the debtor's estate. *Montgomery*, slip op. at 15. *See, also In re Braden*, 69 B.R. 93 (Bankr. E.D. Mich. 1987) (finding that New York law was to be applied in interpreting a TIAA/CREF annuity, and holding that the annuity was not property of the estate pursuant to 11 U.S.C. § 541(a)(2); *In re J.D. Woodward*, No. 3-86-03344(3)7 (W.D. Ken., July 21, 1988) (finding that under New York law the two plans constituted spendthrift trusts and holding that the property was not property of the debtor's estate).

All of the courts cited *supra* in considering the nature of CREF relied upon two leading New York cases regarding the spendthrift nature of TIAA and CREF. In *Alexandre v. Chase Manhattan Bank, N.A.*, 403 N.Y.S. 2d 21 (N.Y. App. Div. 1978), the court considered a TIAA plan. A former spouse, now a judgment creditor, asked the court to permit her to invade the pension fund to satisfy her judgment. The Court in *Alexandre* found that the judgment-debtor had nothing more than a contingent interest, which would be paid monthly at the starting date of the annuity. The Court emphasized that the contract could not be surrendered nor assigned and held that the pension funds were beyond the reach of the creditor.

In *Aurora G. v. Harold Aaron G.*, 414 N.Y.S. 2d 632 (N.Y. Fam. Ct. 1979), the nature of a CREF plan was specifically

examined. The *Aurora G.* court followed the *Alexandre* decision, and held that the petitioning creditor could not reach the CREF annuity. The *Aurora G.* court emphasized that CREF was created by special act of the New York Legislature, and the non-assignment language within the act controlled.[3] This enabling act, creating CREF, has the following anti-assignment and anti-attachment language:

> No money or other benefit provided or rendered by the corporation hereby formed, nor any rights or interests of any participating person in any benefit provided by said corporation, or any beneficiary of any such person, or of any others who may have a right derived from any such person or beneficiary, shall be subject to assignment or pledge, or be liable to attachment, garnishment, or other process, or to be seized, taken, appropriated, or applied by any legal or equitable process or operation of law to pay any debt or liability of any such person, or of any beneficiary of any such person, or of any others who may have a right under any such person or beneficiary.

1952 N.Y. Laws Cl. 124, § 9.

The cases of *Aurora G.* and *Alexandre* established that under the laws of New York, the CREF plans were unavailable to creditors. The CREF certificate before this Court has the same

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3. *See In re Rodrequiz*, 82 B.R. 74 (Bankr. W.D. Ark. 1987), which involved a factual situation interpreting an employer sponsored savings plan known as Harsco Corporation Savings Plan. The Honorable James G. Mixon, Bankruptcy Judge, Arkansas, in applying Pennsylvania law, determined that the plan did not qualify as a valid spendthrift trust under Pennsylvania law because the debtor had the power to receive the trust corpus at his discretion and the plan funds were assignable.

general anti-assignment language as the CREF certificates analyzed by the other courts cited above. Significantly, the CREF certificate in issue relies upon the New York enabling statute for protection from creditors as Paragraph 36 states that "the benefits and rights accruing to you or any other person under this certificate are exempt from the claims of creditors or legal process to the fullest extent permitted by law. This protection is contained in the statute of the State of New York establishing CREF." By incorporating by reference the New York statute creating CREF, the CREF certificate in issue contins the same spendthrift language as the CREF certificates in *Aurora G.* and *Montgomery*. This Court is persuaded and is controlled by the New York courts, which in applying their trust law to these certificates find them immune to creditors. Further, this Court is persuaded by another line of cases considering the CREF certificates and the provision concerning no cash surrenders. See, *Connick v. Teachers Ins. and Annuity Assn.*, 784 F.2d 1018, 1020-21 (9th Cir. 1986) and cases cited therein. In every case, the courts determined that the contracts did not provide for lump sum payments, and thus even the annuitants were unable to reach the monies in the contracts. *Id.*

This Court, as did the New York courts in *Aurora G.* and *Alexandre* and the bankruptcy courts in *Montgomery* and *Braden*, holds that the CREF certificate, because of the language in the New York statute, is a spendthrift trust. Therefore, this Court finds that the restrictions stated in the annuity plan are enforceable under New York law and are thus excludable from the estate pursuant to 11 U.S.C. § 541(c)(2).

An Order of even date consistent with this Memorandum opinion shall be issued.

/s/ Robert F. Fussell
ROBERT F. FUSSELL
UNITED STATES
BANKRUPTCY JUDGE

DATE: /s/ September 18, 1989

cc: Mary Winzerling, Esq.
P.O. Drawer 3456
Fayetteville, AR 72702

Marion Wagner, Esq.
121-A South Second Street
Rogers, AR 72756

APPENDIX B

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF KENTUCKY

IN RE:)
)
J. D. WOODWARD)
)
Debtor) CASE NO. 3-86-03344(3)
A.P. NO. 3-87-0036

WILLIAM STEPHEN REISZ,
TRUSTEE PLAINTIFF

VS.

J. D. WOODWARD, ET AL. DEFENDANT

MEMORANDUM-OPINION

The issue before the Court in this adversary proceeding is whether the debtor's interests in three retirement programs available through the University of Louisville ("U of L") constitute property of the bankruptcy estate under 11 U.S.C. 541. The issue ws submitted for the Court's decision after the Trustee, Wm. Stephen Reisz, filed a complaint for turnover of certain funds in the possession of the Teachers Insurance and Annuity Association-College Equity Fund ("TIAA-CREF") and Fidelity Investments ("Fidelity"). By Order entered Setpember 14, 1987, this Court requested that counsel for the parties involved file and stipulate as to authenticity, content, and purpose all documents which form the basis for any contract or agreement between the debtor, James M. Woodward, and TIAA-CREF or Fidelity regarding pension, retirement or any other funds held on the debtor's behalf. In complaince with that Order, a stipulation as to the TIAA-CREF documents and briefs were submitted by attorneys for TIAA-CREF, the bankruptcy trustee, and the debtor. However, neither stipulation nor briefs

were submitted as to the Fidelity documents. Consequently, the Court has no evidence by which it can determine whether funds held by Fidelity constitute property of the estate. This memorandum opinion will consider the issue only as it relates to the funds held by TIAA-CREF. An outline of the facts is set forth below.

The debtor, Dr. J. D. Woodward, is a professor at the U of L School of Denistry. He participates in U of L's retirement program as a condition of his employment. Under the plan, the School of Denistry withholds five percent (5%) of his annual base salary for contribution to one or more of three investment funds. Accordingly, the University contributes on the employee's behalf an amount equal to ten percent (10%) of his annual base salry to the fund or funds selected by the employee. In this case, the debtor chose to participate in two of three available plans, TIAA-CREF and Fidelity. As stated previously, this decision limits its scope to the status of funds invested with TIAA-CREF.

As of the date the bankruptcy petition was filed, TIAA-CREF's records reflected an accumulation of $33,834.10 in the TIAA fund and $149,032.15 in the CREF account. To determine whether the accumulated values become property of the estate, it is necessary to carefully analyze the provisions of the plan documents. The TIAA contract and the CREF certificate filed by the parties clearly state that there is no provision for cash surrender or loans and that neither document can be assigned. Although both agreements provide that the annuitant purchases a fully paid share in the respective funds, the right to receive payment under the plan is limited to the occurence of certain events. Thus, the debtor can receive the annuity payments only upon retirement or termination of employment from the University. His beneficiaries may be entitled to receive death benefits if the debtor dies before his designated retirement date.

Most pertinent to this Court's analysis are the anti-alienation and no-assignment clauses contained in the TIAA contract and the CREF certificate. The language of the two agreements vary

only slightly. Paragraph 16 of the TIAA contract protects the fund against claims of creditors as follows:

> The benefits, options, rights, and privileges accruing to any Beneficiary will not be transferrable or subject to surrender, commutation, or anticipation, except as may be otherwise endorsed on this contract. To the extent permitted by law, annuity and other benefit payments will not be subject to the claims of any creditor of any Beneficiary or to execution or to legal process.

Similarly, the CREF certificate refers to its enabling statute which provides that no money or other benefit from or rendered by the corporation, nor any rights or interest of any participating person in any benefit provided by the corporation shall be subject to assignment, pledge, attachment, garnishment or other process or be seized, taken, appropriated or applied by any operation of law to pay any debt or liability of any such person. L. 1952, Chapter 124, Sec. 9.

In addition, the TIAA-CREF documents specify that the debtor has no present right to withdraw any of the accumulated funds. When the debtor signed the agreements in May of 1970, he elected to begin receiving annuity payments at his anticipated retirement date, December 1, 2001, at which time he will be 65 years old. Because the debtor has participated in the program for more than five years, he holds no right to repurchase his contract, even if he leaves the teaching profession altogether. U of L's Retirement Handbook states that after the five-year period lapses, the employee's and the University's money, plus accrued interest, is "locked in" until retirement.

Keeping the plan's provisions in mind, the Court's analysis shifts to the applicable law. The issue for determination is whether the debtor's retirement accounts constitute property of the estate under Section 541(a) of the Bankruptcy Code or whether they are excluded under Section 541(c)(2). As ex-

pected, the Trustee maintains that the first contention is true while the TIAA-CREF counsel argues the latter. The Trustee correctly points out that this Court previously recognized that the bankruptcy estate is to be broadly defined in accordance with Section 541(a). *In re Slezak*, 63 B.R. 625, 627 (Bkrtcy. W.C. Ky. 1986). However, 541(c)(2) establishes an exception: "A restriction on the transfer of a beneficial interest of the debtor in a trust that is enforceable under applicable bankruptcy law is enforceable in a case under this title."

In *Slezak, supra.*, this Court examined the Congressional intent behind Section 541(c)(2) and concluded that only a classic spendthrift trust is excluded from the bankrupt's estate. *Id.* at 628. The Trustee, in turn, maintains that the instruments which fund the retirement accounts are not trusts but annuity agreements which create a debtor-creditor relationship. This Court is not so persuaded. The debtor's "interest" is merely a right to receive payments in the future contingent upon the occurrence of certain events. See *In re Braden*, 69 B.R. 93, 94 (Bkrtcy. E.D. Mich. 1987). Further, the debtor has no right to withdraw the funds or use the accounts as collateral so long as he remains employed. Therefore, the Court must refer to "applicable nonbankruptcy law" to determine whether the pension funds are spendthrift trusts. *In re Slezak, supra.* at 628. In this case, the applicable nonbankruptcy law is the state trust law of New York, as provided by the TIAA-CREF contracts.

New York Estates, Powers and Trusts Law § 7-1.5.(a)(1) (McKinney 1988) states:

> The right of a beneficiary of an express trust to receive the income from property and apply it to the use of or pay it to any person may not be transferred by assignment or otherwise unless a power to transfer such right, or any part thereof, is conferred upon such beneficiary by the instrument creating or declaring the trust.

Clearly, the statutory law of New York recognizes the existence and enforceability of spendthrift trusts. Indeed, one New York court has already recognized the enforceability of the anti-alienation, garnishment, and assignment provision of the TIAA-CREF documents. *Alexandre v. Chase Manhattan Bank, N.A.*, 403 N.Y.S.2d 21, 61 A.D.2d 537 (1978). Under New York law, the provisions of the TIAA-CREF documents effectively restrict the debtor/beneficiary's ability to transfer his interest in the accounts and also preclude the beneficiary's creditors from reaching the funds. This Court finds that the contrracts are valid spendthrift trusts for the purposes of Section 541(c)(2).

The Court rejects for two reasons the Trustee's argument that the debtor/beneficiary is also the settlor and therefore unable to find his own spendthrift trust. First, the Trustee relies on a provision of the Kentucky spendthrift trust statute which is not controlling. Second, the debtor is a plan participant and therefore a contributor solely as a condition of his employment. This Court agrees with the statements found in *In re White*, 61 B.R. 388, 393 (Bkrtcy. W.D. Wash. 1986): "Pension funds are not self-settled merely because they are funded in part by employee contributions or by funds contributed by the employer as compensation for employment." Such plans "funded as a necessary incident of employment. . .are voluntary only in the sense that the employee voluntarily remains an employee." *Id.* at 393.

At this juncture, the Court must point out that the cases cited by the parties herein concern different retirement plans with varying provisions on alienation and transferrability. Consequently, each case must be examined on its own facts. In view of the facts and circumstances of the present case, the Court concludes that the debtor's interests in the TIAA-CREF funds are not property of the estate under Section 541(a). The Trustee's complaint against TIAA-CREF is necessarily dismissed. However, the Court must reserve its ruling with respect to the funds held by Fidelity investments.

This memorandum opinion constitutes findings of fact and conclusions of law pursuant to Fed. R. Bankr. P. 7052.

An Order consistent with this opinion will be entered this day.

A copy of the foregoing was mailed to David Stosberg, Counsel for Debtor, 2600 Citizens Plaza, Louisville, Kentucky 40202, Michael A. Duncan, 505 Turfway Ridge Office Park, 7300 Turfway Road, Florence, Kentucky 41042, Wm. Stephen Reisz, Trustee, 426 West Jefferson Street, Louisville, Kentucky 40202.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

IN RE:

J.D. WOODWARD,
Debtor, Case No. 3-86-03344 (3) 7

WILLIAM STEPHEN REISZ,
Trustee, Appellant, CIVIL ACTION

v. C 88-0161-L(A)

TEACHERS INSURANCE & ANNUITY
ASSOC. COLLEGE RETIREMENT EQUITIES
FUND,
Appellee.

ORDER OF AFFIRMANCE

This matter having come before the Court on appeal from the United States Bankruptcy Court for the Western District of Kentucky, and the Court having entered its memorandum opinion and being advised,

IT IS ORDERED that the decision of the United States Bankruptcy Court is affirmed insofar as it determined that the plans in issue were excluded from the bankruptcy estate pursuant to 11 U.S.C. Sec. 541(c)(2).

This is a final order.

Dated /s/ 6-24-88

/s/ Charles M. Allen
Charles M. Allen, Senior Judge

cc: Counsel of Record

ENTERED
JUN 24 1988
JESSE W. CRIDER, CLERK
By DEPUTY CLERK

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

IN RE:

J.D. WOODWARD,
Debtor, Case No. 3-86-03344 (3) 7

WILLIAM STEPHEN REISZ,
Trustee, Appellant, CIVIL ACTION

v. C 88-0161-L(A)

TEACHERS INSURANCE & ANNUITY
ASSOC. COLLEGE RETIREMENT EQUITIES
FUND,
Appellee.

MEMORANDUM OPINION

This action comes before the Court on appeal from the judgment of the Bankruptcy Court entered on the 16th day of February, 1988. The question presented on appeal is whether the debtor, Dr. J.D. Woodward, who owned interests in retirement programs offered through the University of Louisville, was entitled to have these interests excluded from his bankruptcy estate. The Bankruptcy Court determined that the interests were excludable. We affirm the result.

Dr. Woodward is a professor at the University of Louisville School of Denistry who participates in the University's retirement program as a condition of his employment. Under the program, the School of Denistry withholds five percent of his annual base salary for contribution to one or more of three investment funds. The University contributes to the funds selected by the employee an amount equal to ten percent of the

employee's annual base salary. This case concerns debtor's participation in one of the three available plans, administered by Teachers Insurance and Annuity Association-College Retirement Equity Fund (TIAA-CREF).

At the time of the filing of the bankruptcy petition, TIAA-CREF's records reflected an accumulation of $33,834.10 in the TIAA Fund and $149,032.15 in the CREF Fund. To determine whether these accumulated values became property of the estate, it is necessary to carefully analyze the provisions of the plan documents. Both the TIAA contract and the CREF certificate clearly state that there is no provision for cash surrender or loans, and that neither document can be assigned. Both agreements provide no present right to withdraw accumulated funds, and provide that the participating employee can receive annuity payments only upon retirement or termination of employment from the University. His beneficiary may receive those benefits if he dies before his designated retirement date.

Paragraph 16 of the TIAA contract states as follows:

> The benefits, options, rights and privileges accruing to any beneficiary will not be transferrable or subject to surrender, commutation or anticipation except as may be otherwise endorsed on this contract. To the extent permitted by law, annuity and other benefit payments will not be subject to the claims of any creditor of any beneficiary or to the execution or to legal process.

The CREF certificate refers to an enabling statute which provides that no money or other benefit from or rendered by the corporation nor any rights or interests of any participating person in any benefit provided by the corporation shall be subject to assignment, pledge, attachment, garnishment, or other process or be seized, taken, appropriated or applied by any

operation of law to pay any debt or liability of any such person. See New York Law, L-1952, Chapter 122, Section 9.

When the debtor signed the TIAA-CREF agreement in May of 1970, he elected to begin receiving annuity payments as of December 1 in the year 2001, at which time he will be sixty-five years old. Since he has already participated in the program for more than five years, he has been barred by the University of Louisville Retirement Handbook from receiving any money from the plan until the date of his retirement.

Section 541(a) of the Bankruptcy Code requires the inclusion in the estate of all property in which the debtor has a legal or equitable interest at the commencement of the case. The section is very broad in its reach and clearly emphasizes the Congressional intent that all kinds of property be included in the bankrupt's estate, even that needed for a fresh start. See *In Re: Slezak*, 63 B. R. 625 (Bankr.Ct., W.D.Ky. 1986); see also Sen. Rpt. No. 95-989, 1978 U.S. Code Cong'l. & Admin. News 5787 at 5868.

Section 541(c)(1) clearly states that restrictions on transfer that appear in "any provision in an agreement, transfer instrument, or applicable nonbankruptcy law" are insufficient to prevent an interest of the debtor from becoming property of the estate.

However, Section 541(c)(2) provides as follows:

> A restriction on the transfer of the beneficial interest of the debtor in a trust that is unforceable under applicable non-bankruptcy law is enforceable in a case under this title.

In *Hovis v. Wright*, 751 F.2d 714 (4th Cir. 1985), the court was asked to address both Sec. 541(a) and Sec. 541(c)(2). The Bankruptcy Court had held that the debtor's contributions to a state school teacher's retirement system were nonexempt property of the estate. The district court reversed, holding that the funds were property of the estate, but they were exempt under

Sec. 541(c). The appellate court held that it was unnecessary for it to reach the question of whether the contributions were property of the estate under Sec. 541(a)(1), in view of its determination that the contributions were exempt from the bankruptcy estate because of governing South Carolina law exempting certain property from attachment, levy, and sale. We agree that this is a logical manner of proceeding, and we do not decide whether the retirement funds would be considered property of the estate.

The funds are located in New York and the contracts were executed in that state. It is agreed that New York law controls. New York Estates, Powers and Trust Laws, Section 7-1.5(a)(1) McKinney 1988 states as follows:

> The right of a beneficiary of an expressed trust to receive the income from property and apply it to the use [of] or pay it to any person may not be transferred by assignment or otherwise unless a power to transfer such right or any part thereof is conferred upon such beneficiary by the instrument creating or declaring the trust.

A second important provision of New York statutory law is the CREF enabling status, mentioned earlier. That enabling statute contained separate restrictions on alienability.

A Bankruptcy Court found that the pension funds were in essence spendthrift trusts under the law of New York, as Sec. 7-1.5(a)(1) was interpreted in the case of *Alexandre v. Chase Manhattan Bank, N.A.*, 403 N.Y.S.2d 21, 61 A.D.2d 537 1078), which involved, inter alia, a TIAA plan. *Alexandre* involved a former spouse's request to satisfy a judgment for alimony and child support arrearages by invading the principal of trust funds in which the respondent had an equity. In rejecting her claim to the TIAA funds, the Court quoted from *Cohen v. First National Bank*, 49 Mis[c].2d 141, 267 N.Y.S.2d 146, as follows: "... the critical test is whether the judgment debtor has an interest which

he might reach ... only that interest may be reached by his creditor, and only at the time and to the extent that it is ripe." Since the debtor had no interest that he could reach before retirement age, the Bankruptcy Court held that the contracts constituted excludable spendthrift trusts under New York law.

The nature of TIAA and CREF plans was examined again in the case of *Aurora G. v. Harold Aaron G.*, 98 Misc. 2d 695, 414 N.Y.S.2d 632 (1979), and a difference in the manner of receiving benefits was held to require a different result. The court agreed that the CREF enabling statute was determinative and placed that plan beyond the reach of creditors. However, the beneficiary had begun receiving payments under the TIAA plan prior to the litigation. Noting this fact, and the fact that TIAA, unlike CREF, was not created by special legislation, the *Aurora G.* court held that the terms of the TIAA contract, standing alone, did not insulate the currently due benefits from creditors.

In view of *Alexandre* and *Aurora G.*, we believe it significant that in our present case there is substantial support for the Court's finding concerning right to receive benefits. The Court found that no benefit payments are currently due, and debtor has no present right to the funds.

The appellant contends that the Bankruptcy Court's opinion is erroneous and contrary to the decisions in the cases of *In Re: Graham*, 726 F.2d 1268 (8th Cir. 1984), and *Regan v. Ross*, 691 F. 2d 81 (2d Cir. 1982). *Regan, supra*, involved the question of systems to transfer a portion of their monthly benefits for distribution to creditors under Chapter 13 of the Bankruptcy Code. The pension beneficiaries participated in a state pension system set up in New York under a New York statute which provided that state pension benefits should not be subject to execution, garnishment, attachment or any other process, and should be unassignable. N.Y. Retire & Soc. Sec. Law Sec. 110 (McKinney 1971).

The *Regan* court took the position that Chapter 13 of the new Bankruptcy Code contemplated that pension benefits would be used to make repayment plans with the Chapter 13 creditors

rather than the debtor being forced into straight bankruptcy. See *Regan, supra*, at 85. In light of the language in *Cohan*, quoted above, we belive it is highly significant that the pensioners in *Regan* had present access to the monthly benefits in issue.

The *Regan* court went on to hold that the pension funds under the New York retirement system should not be granted automatic exemption under Section 541(c)(2). On page 86 of its opinion, the *Regan* court did not explicitly decide whether or not the pension funds were "spendthrift" in form. Instead, the *Regan* court emphasized the need of the pensioners to have access to their pension funds in order to consummate a Chapter 13 plan. The court also emphasized 11 U.S.C. 522(d)(10)(E), which provides that "A debtor may exempt from estate property 'a payment under a ... pension ... plan or contract on account of illness, disability, death, age, or length of service.'" The court pointed out that this would indicate that pension benefits were meant to be the property of the estate and that the debtors did not wish an exemption "but rather proposed inclusion of the pension benefits in their voluntary Chapter 13 plans.

In footnote 14 on page 86, the *Regan* court noted that the New York Court of appeals in *Caravaggio v. Retirement Bd.*, 329 N. E.2d 165, 169 (1975), has stated that a state pension plan "is not unlike a spendthrift trust, except that it is stronger in purpose by virtue of statute and Constitution." In *Caravaggio*, the court held that a deceased pensioner had the right to name his second wife as a death beneficiary after he had irrevocably assigned his pension rights to his first wife pursuant to a separation agreement. There, the court held that the "first assignment could not be honored because this would be contrary to the state's policy of preserving unfettered a pensioner's right to designate a beneficiary."

In Re: Graham, supra, notes that traditional spendthrift trusts under state law are not to be included in a bankruptcy estate but holds that there is no automatic exemption for pensions created under ERISA even though ERISA-created pensions contain anti-alienation clauses. This conforms to the

holding in *Slezak, supra*, which held that anti-alienation clauses do not constitute a shield where the equitable owner has some rights of present access.

Directly contrary to *Regan, supra*, and *In Re: Graham*, is the case of *McLean v. Central States, S. & S. Areas Pension Fund*, 762 F. 2d 1204 (4th Cir. 1985). The court held there that where the debtor was a pensioner under an ERISA qualified fund which necessarily contained an anti-assignment provision preventing alienation of benefits by the beneficiary, there was created a spendthrift trust under Illinois law. The court in *McLean, supra*, pointed out that contributions to the fund were made only by employers, and employees had no power to revoke the trust and reach its corpus.

The *McLean* court rejected the arguments which were accepted by the courts in *In Re: Graham* and *Regan v. Ross* to the effect that because pension interests are made subject to exemptions under 11 U.S.C. 522(d)(10)(E), they necessarily must be estate property under 541(a)(1). The *McLean* court held that "whether a particular pension fund interest subject to transfer restrictions is initially included in estate property is wholly determined by whether, per § 541(c)(2), the restriction is enforceable under applicable nonbankruptcy law, including any public policy concerns that might make unenforceable a restriction in a pension plan settled and revocable by a beneficiary." Citing *Goff v. Taylor (In re Goff)*, 706 F. 2d 574, 586-89 (5th Cir. 1983).

We note with interest that both *McLean* and *In Re: Graham* cite with approval *In re Goff*. *In re Goff* holds that Section 541(c)(2) is intended to exempt only spendthrift trust assets from the bankrupt estate. It holds, however, that a self-settled Keogh plan was not subject to exemption and became part of the bankrupt's estate under 541(c)(2). The basis for the opinion is that the plan did not qualify as a spendthrift trust under state law.

We believe that the approach in *Goff* is the correct one, and that the basic question is whether or not the two funds in issue here qualify as spendthrift trusts under New York law.

The case of *In re Braden*, 69 B.R. 93 (Bankr. Ct., E.D. Mich. 1987) addressed precisely this issue. Like the court in *Hovis, supra*, the *Braden* judge held that it was unnecessary to determine whether the debtor's rights in the TIAA and CREF plans constituted property of the estate under Sec. 541(a)(1). Reading *Alexandre, supra*, as direct authority for the proposition that these plans are considered spendthrift trusts under applicable New York law, the court ruled that they were exempt pursuant to Sec. 541(c)(2). The Bankruptcy Court also observed that other cases, including *In re Goff, supra*, were distinguishable because of differences in the types of retirement plans in issue. We believe that this observation, echoed by the Bankruptcy Court in the present case, is central to an understanding of apparent conflicts in the cases.

We believe that the Bankruptcy Court correctly held in this case that under New York law the two plans constituted spendthrift trusts. We recognize that *Regan* reaches a different result than that reached by the Bankruptcy Judge in the case at bar but note that the *Regan* court was there concerned with the wish of the debtor to include the pension benefits in his estate under Chapter 13, and also that the *Regan* court did not specifically reach the question of whether or not the state retirement plans in issue there constituted spendthrift trusts under New York law.

As the debtor in this case had no present right to reach the funds in question or to revoke the trusts, as the trusts were not self-settled, and in view of the governing contracts and New York law, we detect no error in the Bankruptcy Court's findings of fact or conclusions of law, and we must affirm the decision on the basis of Sec. 541(c)(2). We need not reach the question of inclusion under Sec. 541(a)(1). An order in conformity has this day entered.

Dated /s/ 6-24-88

/s/ Charles M. Allen
Charles M. Allen, Senior Judge

cc: Counsel of Record